U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: DEC. 31, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a digital commerce technology firm, seeks to temporarily employ the Beneficiary as its vice president of business development under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in an executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the denial decision "is riddled with errors" concerning information and evidence in the record.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that that the Petitioner did not establish that it will employ the Beneficiary in an executive capacity. The Petitioner does not claim that it seeks to employ the Beneficiary in a managerial capacity.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Based on the statutory definition of executive capacity, a petitioner must first show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

When examining the claimed executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner listed the Beneficiary's proposed U.S. duties and the time to be devoted to each:

- Responsible to evolve new strategies and programs to grow [the Petitioner's] client base in the areas of Oracle Commerce and INSITE Commerce (25% of his time)
- Identify and expand the company's footprint in new geographical areas (10% of his time)
- Responsible to create and submit responses to Request[s] for Proposals (RFP) (20% of his time)
- Responsible for managing and strengthening the partner program with Oracle Commerce and INSITE for eCommerce platforms (10% of his time)
- Handle all the financial operations of the U.S. company (10%)
- Responsible for the regulatory compliance for the company (5%)
- Responsible for audits and review of the company's books and presenting them to the Board of Directors (5%)
- Interviewing/hiring new potential engineers, makes final hiring decisions (10%)
- Training company's engineer staff on software systems (5%)

In the denial notice, the Director found that the job description is "vague," and that "the beneficiary's tasks are part of the consulting services that [the Petitioner] offers to [its] clients." The record does not support the latter conclusion, which appears to arise from a misreading of consulting agreements in the record.

With respect to the Beneficiary's job description, the Petitioner asserts that the Director considered "only the bullet points" reproduced above, rather than the "very detailed description" that elaborated on each of the above points. Review of the more detailed description, however, does not establish eligibility. Even with the Petitioner's elaborations, some of the responsibilities remain vague. The Petitioner stated that the Beneficiary's work "expand[ing] the company's footprint" would involve participating in "trade shows, conferences, and business networking events," as well as "[n]ew client acquisition . . . through active networking." The Petitioner did not fully explain the nature of this participation and networking, and therefore it is not evident that these tasks are consistent with an executive capacity. Similarly, the Petitioner stated that the Beneficiary will "[e]nsure that the US complies with all legal requirements," but did not explain what tasks this responsibility would entail or who would perform the non-executive functions (such as preparing paperwork) involved in meeting compliance requirements.

Other tasks appear to be lower-level operational tasks. Regarding the preparation and submission of RFPs, the Petitioner stated that the Beneficiary's "subordinate engineering managers in India . . . will be responsible for drafting the actual RFPs. However, [the Beneficiary] will . . . be responsible for submission of these responses and interfacing with the potential new customers." It is not evident that discussing individual projects with prospective clients is an executive-level task.

"[M]anaging and strengthening the partner program" would also involve significant customer contact by the Beneficiary, who "will be responsible to build and manag[e] these relationships" "with US customers in person."

Interviewing and hiring engineers is, at most, a managerial rather than executive task, and there is no provision for a hybrid manager/executive position with some responsibilities of each type of position. The Petitioner stated that the Beneficiary will "ensure that all software engineers working for the US company receive adequate and ongoing training," but there is no other U.S. staff other than the Beneficiary to provide that training. Training newly-hired engineers is a lower-level operational responsibility.

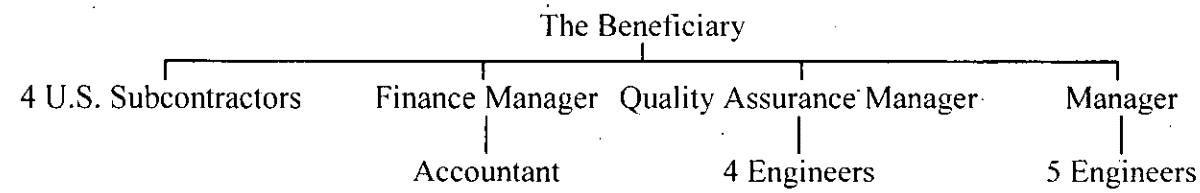
The remaining responsibilities appear to be more consistent with an executive capacity, but the Petitioner's own estimates indicate that they would take up less than half of the Beneficiary's time, and therefore the Beneficiary would not *primarily* perform executive duties as required.

B. Staffing

The Petitioner stated that the Beneficiary "will oversee a group of contractors as well as Indian subordinates," and "will spend 100% of his time managing the work done by others as opposed to carrying out functions himself."

At the time of filing, the Petitioner's only U.S. employee was the company's president. The Petitioner asserted the U.S. staff would grow after the Beneficiary's arrival in the United States, but the Petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Therefore, we must look at the company's existing staffing at the time of filing, rather than the Petitioner's hypothetical plans to expand in the future. (Because the Beneficiary is not yet working in the United States, any job description will necessarily be prospective, but that job description must rely on the company structure as it already exists, rather than what the Petitioner plans for some point in the future.)

An organizational chart indicated that the Beneficiary would oversee foreign employees and U.S. subcontractors:



The Petitioner submitted copies of consulting agreements relating to three of the subcontractors named on the chart. The agreements are generic, accompanied by work orders that specify the dates of service and the hourly pay rate, but not the nature of the contracted work.

The résumé for the fourth subcontractor indicates that the individual has a background in human resources rather than computer science. The résumé listed three responsibilities with the petitioning company, without elaboration: "Recruitment for all levels of consultants," "Deal with Vendors," and "Create JD's."

In the denial notice, the Director stated that the individuals named as subcontractors on the organizational chart are not contractors, but rather "the employees of [the Petitioner's] clients," and that the Petitioner had not explained how the Beneficiary would have executive authority over those individuals.

The record does not support the Director's finding that the named subcontractors are "employees of [the Petitioner's] clients." The submitted consulting agreements indicate that the named individuals will "provide certain consulting and other technology related services" to the Petitioner. But the record is inconsistent with regard to the Beneficiary's intended authority over the subcontractors.

On appeal, the Petitioner states: "Nowhere in the record does the petitioner claim or indicate that [the Beneficiary's] job duties in the U.S. will entail controlling the work of the subcontractors." But initially, the Petitioner stated that the Beneficiary "will oversee a group of contractors . . . after his transfer to the U.S." In response to a request for evidence, the Petitioner stated that "U.S. contractors . . . will report directly to [the Beneficiary]." (The Petitioner indicated that, at present, its president "is responsible for managing the work performed by the contractors," but the Petitioner also acknowledged that the president is "the only employee of the U.S. organization currently.")

The Beneficiary's job description does not mention the subcontractors, but that job description also assumes the presence of subordinate U.S. employees whom the Petitioner has not yet hired.

The Petitioner asserts that the Beneficiary's executive capacity will derive from his authority over the larger organization, including subordinates in India. The job description referred to continued interaction with "subordinate . . . Managers in India," but as discussed above, the Petitioner has not shown that this oversight will be among the Beneficiary's *primary* responsibilities.

Based on the deficiencies inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a primarily executive capacity in the United States.

III. QUALIFYING RELATIONSHIP

Beyond the Director's decision, the record does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

To qualify as affiliates, the U.S. and foreign employers must be "owned and controlled by the same parent or individual," or "legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity."

8 C.F.R. § 214.2(l)(1)(ii)(L). The Petitioner asserted that the two companies meet the second requirement.

The two companies, however, are not owned by the same group of individuals. The U.S. entity has five shareholders. Those five individuals also own shares in the foreign entity, in the same proportions relative to one another, but there is also a sixth shareholder who owns 2000 out of 17,750 shares issued by the foreign entity. When the Petitioner disclosed this information, after the initial filing, the Petitioner stated: "Despite this additional shareholder, the companies nevertheless exist in a qualifying corporate relationship, as they are controlled by the same group of individuals with each individual owning and controlling approximately the same proportion of each entity." Specifically, the Beneficiary and one other shareholder each own 32% of the U.S. entity and about 28% of the foreign entity. The Petitioner asserts that these two individuals "together own a majority of both the Indian and U.S. companies." (No single shareholder owns a controlling interest in either company.)

The regulation, however, requires the two entities to be "owned and controlled by the same group of individuals." The Petitioner, here, has attempted to modify this definition, by looking only at a subset of the owners, and asserting that this smaller group shares ownership and control in similar proportions.

In this case, the Petitioner has five shareholders, and the foreign entity has six. While the companies have five owners in common, we cannot accept a combination of some or all of those five individual shareholders as a single entity, so that the group may claim common ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

The Petitioner must establish that it and the foreign employer share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

The record does not show that the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer.

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a primarily executive capacity, or that it has a qualifying relationship with the Beneficiary's foreign employer.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 1811089 (AAO Dec. 31, 2018)